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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

DOUGLAS JENSEN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. WHETHER PROBABLE CAUSE TO ARREST, UNDER THE SO-CALLED "COLLECTIVE KNOWLEDGE DOCTRINE", CAN BE JUSTIFIED, AFTER THE FACT, ON THE BASIS OF "PRESUMED KNOWLEDGE" NOT COMMUNICATED TO THE ARRESTING OFFICER.

2. IS IT UNCONSTITUTIONAL FOR THE SENTENCING DISCRETION TO BE SOLELY IN THE HANDS OF THE EXECUTIVE?

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## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mr. Douglas Jensen, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The opinion of the Court of Appeals (App. A) is published: United States v. Jensen, 425 F.3d 698 (Ninth Cir. 2005). The opinions of the District Court is unreported. (ER 64-77)

## JURISDICTION

The Judgment of the Ninth Circuit was entered on October 6, 2005. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case presents two separate issues involving different Articles and Amendments to the U.S. Constitution.

The first issue addresses the application of the "collective knowledge doctrine" as it has been applied to the probable cause requirement contained in the Fourth Amendment to the United States Constitution, reproduced at App. B.

The second issue implicates the separation of powers

doctrine and the delegation of power doctrine as governed by Art. I, II and III of the United States Constitution. Several sections of the United States Code, 21 U.S.C. §851, §841(a)(1), and §841(b)(1)(A) are also implicated.

## STATEMENT OF THE CASE

This is an appeal from a criminal conviction entered in the United States Court for the District of Montana, Missoula Division. Mr. Jensen was convicted of the offense of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §841(a)(1). This case presents two issues for consideration by the Court.

First, is the question of whether probable cause to arrest, under the so-called "collective knowledge doctrine"[1], can be justified after the fact on the grounds that another officer, *not participating in a coordinated investigation, not at the scene of the arrest and not in communication with the arresting officers*, was at the time of the arrest in possession of the necessary underlying facts supporting the arrest. This Court has never defined what the limits of the "collective knowledge doctrine" are, or if there are any.

This lack of direction has resulted in substantial confusion in the lower courts attempting to define what

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[1] The "collective knowledge doctrine" has alternatively been labeled the "fellow officer rule" and "pooled knowledge principle" by the various lower courts.

information can be imputed between varying law enforcement officers, and when that information may be imputed from one officer to another.[2] Lower courts' attempts to reconcile their various holdings have been unsuccessful, resulting in disparate treatment of the issue among the circuits.

Secondly, was Mr. Jensen wrongfully sentenced to life imprisonment, in violation of the separation of powers doctrine and the delegation of power doctrine, since the Executive Branch determined the sentence .

## A. FACTS OF THE SCENE AND THE ARREST

At approximately 8:30 on the morning of February 19, 2003, Sergeant Lonnie Cook, a police officer with the City of Whitefish, Montana, while monitoring the Flathead County dispatch frequency, heard an "attempt to locate" radio bulletin regarding a citizen report of a possible drunk driver speeding somewhere in the neighboring city of

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[2] Some of the cases specifically discussing the lower courts' struggles in reconciling this issue include: *Bailey v. Newland*, 263 F.3d 1022, 1031-32 (9th Cir. 2001); *U.S. v. Meade*, 110 F.3d 190, 194, n.4 (1st Cir. 1997); *U.S. v. Shareef*, 100 F.3d 1491, 1503-04 (10th Cir. 1996); *United States v. Newman*, 265 F. Supp.2d 1100, 1106-1108 (D. Arizona 2003); *U.S. v. Conner*, 948 F. Supp. 821, 840-43 (N.D. Iowa 1996).

Kalispell[3]. (ER 105, ln. 15-23; 106, ln. 6-18)[4] information conveyed via Flathead County Sheriff dispatch identified a black Ford Taurus station wagon, together with a plate number. (ER 108, ln. 1-5) Cook thought the reported vehicle might belong to Douglas Jensen.

Prior to January 2003, Cook had been with the Northwest Drug Task Force (NWDTF). (ER 103, ln. 18 -104, ln. 10) Cook testified Jensen was someone whom he had "received intelligence on while working at the Northwest Drug Task Force." (ER 108, ln. 8-10)

Cook confirmed through dispatch that the wanted vehicle belonged to Jensen, and drove to intercept Jensen . Cook initiated a stop of the black Taurus outside of the City of Whitefish, as Jensen turned onto the private drive toward his home. (ER 108, ln. 18-19)

Cook told Jensen that he had been stopped because an "attempt to locate" for "[r]eckless driving, possible DUI, the excessive speed going through the north end of Kalispell." (ER 113, ln. 9-16) Two Flathead County officers, Deputy Tykachk and Corporal Meredith, arrived shortly

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[3] The cities of Whitefish and Kalispell are located approximately 15 miles apart in Flathead County, Montana.

[4] Citations follow the abbreviations used in the court of appeals for the Excerpts of Record ("ER") filed with the Ninth Circuit Court of Appeals.

thereafter. (ER 114, ln. 4-13)

Cook told Meredith that he had "prior intelligence from the Northwest -- working on the Northwest Drug Task Force that Jensen may be involved in some other things." (ER 114, ln. 16-19) Cook never did explain (either at the scene, or while testifying) what this alleged "prior intelligence" was. Since Cook did not have jurisdiction to apprehend Jensen for the driving offense, Jensen was relinquished to the custody of the Flathead County Officers who did have jurisdiction so that they could "conduct their investigation". (ER 114, ln. 19-25; ER 131, ln. 17-18)

From the outset, Cook conceded duplicitous motives in his investigation of Jensen. (ER 119, ln. 1-7) Cook called NWDTF Officer Michael Meehan, who had replaced Cook at the NWDTF when Cook returned to the Whitefish City Police Department. (ER 146, ln. 6-8) Cook's reason for calling Meehan was to "pursue an additional investigation". (ER 119, ln. 5-6)

Cook testified that he told Meehan, "**I've got a traffic stop and it's with Mr. Jensen, do you have any ongoing investigations or are you looking at him for anything?**" Officer Meehan's only reply was reported as, "**Oh, I didn't know he was back from Mexico.**" (ER 116, ln. 1-4 ) **(emphasis added)** This is the sum and substance of all the evidence in the record of the content of any actual

communication between Cook and Meehan. Meehan arrived as the Flathead County Officers completed their DUI investigation. (ER 115, ln. 21-22.)

In order to accomplish the planned "additional investigation", Cook counted on Jensen being arrested for a criminal traffic offense, with the expectation that Jensen's car would be impounded, and therefore available to a drug-sniffing dog. Cook testified: "If there was going to be anything, the vehicle would have to be impounded." (ER 126, ln. 15-19; ER 133, ln. 25 - ER 134, ln. 3) Any chance to search with the dogs, without a warrant, depended upon Jensen's arrest for the traffic offense.

But Meredith soon announced that Jensen was not under the influence, and that there was insufficient information to arrest him for Reckless Driving. (ER 114, ln. 8-9) Meredith told Cook that Jensen would be cited for Careless Driving, and would then be released at the scene without arrest. (ER 124, ln. 11-16) Cook objected, saying that he wanted Jensen arrested for Reckless Driving, but Cpl. Meehan disagreed that his investigation warranted the heavier charge. (ER 142, ln. 15-18)

While Meehan discussed the non-arrest decision with the Flathead County Officers Cook called Kalispell City Police Dispatch (ER 85, ln. 6-8; ER 152, ln. 8-11) Meehan "was unaware [Cook] was making that call." (ER 152, ln.

8-13)

Cook reached Officer Zimmerman, a dispatch officer with the Kalispell City Police Department. Cook told Zimmerman that he had apprehended Jensen, and requested permission to arrest Jensen for reckless driving. (ER 83, ln. 25-84, ln. 4; ER 95, ln. 9-12) Cook withheld from Zimmerman the fact that Flathead County Officers were already on the scene and had completed their investigation, deciding to cite and release Jensen.[5] (ER 94, ln. 5-12; ER 125, ln. 5-22) Zimmerman was specifically kept ignorant of the fact "that they were there at all." (ER 94, ln. 11-14)

In light of the deceptively limited information Cook choose to reveal during that brief phone call, Zimmerman gave Cook clearance to arrest Jensen for reckless driving. (ER 83, ln. 25-84, ln. 4; 85, ln. 6-15) Jensen was arrested by Cook for reckless driving.

Zimmerman dispatched Kalispell City Officer Wicher north, and directed Cook to proceed south, with the understanding that the two officers would meet between Whitefish and Kalispell, to transfer Jensen into City of

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[5] Flathead County officers are imbued with concurrent jurisdiction with the City of Kalispell for violations of state law occurring within the Kalispell city limits, and therefore had the authority and ability to issue a Reckless Driving ticket, if they had probable cause to do so. (ER 94, ln. 13-19; 99, ln. 13-22

Kalispell custody. (ER 83, ln. 19-24; ER 98, ln. 14-18) The ostensible purpose of the custody transfer was so that a City of Kalispell officer could issue a citation to Jensen, and he would then be immediately permitted to post a bond. (ER 98, ln. 19-25)

As planned, Jensen's car was then impounded. (ER 117, ln. 8-10; ER 118, ln. 8-13) However, contrary to Kalispell dispatch transport instructions, Cook instead took Jensen north, away from Kalispell, to the Whitefish Police Department where he was held while Cook and Meehan sought advice from their superiors about asking Jensen for consent to search his car. (ER 118, ln. 14-15; ER 119, ln. 12-14)

Some two hours after the initial detention ,Cook began transporting Jensen south toward Kalispell. (ER 135, ln. 11-19; ER 136, ln. 12-19) By that time, Canine Unit from an adjoining county had arrived at the tow yard. (ER 119, ln. 16-18) Cook detoured to the tow yard where Jensen's vehicle had been impounded to "[ask] Mr. Jensen for consent to search his vehicle." (ER 119, ln. 18-22 Jensen did not consent to the search. (ER 119, ln. 22)

The drug dog was unleashed and "hit" on the vehicle. (ER 119, ln. 22-25) It was only then, about 11:00, that Jensen was transported for transfer to Officer Wicher, who was waiting at the designated transfer location. (ER

120, ln. 6-8; ER 120, ln. 12-14; ER 135, ln. 15-19; ER 136, ln. 22-24) Jensen was cited, and released by Kalispell after posting a $175 bond. (ER 84, ln. 7-12)

Later that day, Officer Meehan sought and obtained a warrant to search Jensen's impounded vehicle. (ER 44-50) Officer Meehan's warrant application included summary information relating to the stop of Jensen, and the "K9" alert regarding the vehicle. (ER 44, ln. 22-25; ER 46, ln. 16-21)

Meehan's warrant application also included additional information learned from NWDTF Detective McCarvel. Det. McCarvel was not at the scene of the arrest. There is no indication that McCarvel was contacted prior to the arrest by either Meehan or Cook. There is absolutely no evidence in the record to indicate that the information in the warrant application attributed to McCarvel had been conveyed to either Meehan or Cook prior to Jensen's arrest.

After obtaining the warrant, Jensen's previously impounded vehicle was searched. The resulting search of Jensen's impounded vehicle located methamphetamine that formed the basis for the prosecution here. (Government's Trial Exhibits 14 & 15 – ER 208, ln. 20 - ER 212, ln. 15; ER 225, ln. 1 - ER 227, ln. 18)

The following day, February 20, 2004, with the additional information obtained from the seizure of the methamphetamine from the search warrant on the car,

Meehan sought and obtained a second warrant, this time for Jensen's home. (ER 51-57) The second Warrant was executed on February 20, 2004, and resulted in officers seizing additional evidence of drug.

## B. PROCEEDINGS BELOW

### 1. Disposition in the District Court

#### a. The Motion to Suppress and Trial

Jensen was indicted on May 7, 2003, and charged with possession, with intent to distribute, "more than 50 grams of pure methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)." (ER 2-3) On May 15th, 2003, Mr. Jensen appeared in Court and entered a "Not Guilty" plea to the offense alleged against him in the Indictment. Mr. Jensen was incarcerated pending trial.

Jensen filed a Motion to Suppress. Jensen argued that his arrest for reckless driving and seizure of his vehicle were illegal. Consequently, Jensen asked that all evidence obtained thereby, should be suppressed as "fruit of the poisonous tree." (ER 7-18, plus attachments at ER 19-57)

The U.S. District court for the District Court of Montana, Hon. Donald W. Molloy, Chief Judge, presiding, denied Jensen's Motion finding that, although Cook "lacked the authority to effect a pretextual arrest" of Jensen for the alleged reckless driving, there nevertheless was "probable cause to arrest Jensen on the suspicion that Jensen had drugs

in his car." (ER 70-73) Judge Molloy further found that the impoundment of Jensen's car after the arrest was justified under the "community caretaker doctrine", and further that Cook had additional alternative authority to impound the vehicle since he had "probable cause to believe that the automobile contains evidence of a crime." (ER 75-76)

In order to justify the probable cause to arrest for "suspicion that Jensen had drugs in his car", the District Court imputed the information held by the absent Det. McCarvel to Cook at the time of the arrest. However, McCarvel was not at the scene, and did not participate in the arrest decision in any way evidenced by the record. Furthermore, there is no evidence in the record to indicate that any information held by McCarvel had been communicated to either Cook or Meehan prior to the arrest.

A non-jury trial commenced on October 22nd, 2003. Jensen was convicted of the charged crime on the basis of the evidence that was the subject of the Motion to Suppress.

**b. The Sentencing Hearing**

The District Court's Order denying Jensen's Motion to Suppress was filed by the Court on September 23, 2003. The very next day, September 24, 2003, the Government filed an Information pursuant to 21 U.S.C. §851 seeking increased punishment for Jensen; *to wit:* a mandatory life sentence.

Having received a Pre-Sentence Investigation Report, the District Court held the Sentencing Hearing on February 24th, 2004. The District Court sentenced Mr. Jensen to a term of life imprisonment.

The primary focus of Jensen's sentencing hearing was the judge's inquiry and assessment of an appropriate sentence. The hearing began:

Judge: "Well, can you tell me, on the record, why this man should have a life sentence?"

Prosecutor: "I cannot, Your Honor."

Judge: "Yeah, I can't either. And I'm the one that has to give him a life sentence. And it's wrong." (ER 242, ln. 19-23) "I want to know why, for this guy, locking him up for the rest of his life is an appropriate sentence..." (ER 247, ln. 15-17)

The Judge agreed that Jensen's convictions indicated "an escalation" which he felt "justifie[d] the 210 to 260 some months" recommended by the sentencing guidelines. (ER 243, ln. 15-17) He evaluated the case based on the pre-sentence investigation report and Jensen's offense level, and he referred to those and 21 U.S.C. §851 and §841(b)(1)(A) when stating:

Judge: "I don't see anything here that would warrant or that the statute even would contemplate, other than its literal language that this is the kind of individual

that we should be locking up for life. He's a drug addict." (ER 243, ln. 9-10) Yet, "I have to sentence him to life in prison, and I don't think that's right." (ER 247, ln. 11-12) "This is not a career offender." (ER 262, ln. 12)

Jensen's sentence was determined by Executive Branch policy written in a memo dated September 22, 2003, that was addressed to all Federal Prosecutors. In that memo, U.S. Attorney General Ashcroft stated how defendant's would be sentenced during his term. (ER 317) Jensen was affected by the new policy in that it addressed the interplay between the guidelines and §841(b)(1)(A). (ER 314-321) Two days after the new policy was enacted, an §851 Information was filed in Jensen's case. This was months after his indictment. The filing of the §851 would cause Jensen to receive a life sentence if convicted, unless it was reconsidered as requested by the judge:

Judge: "And I guess what I'm asking you is if, in the interests of justice, this isn't a situation where reconsideration of that §851 motion wouldn't be appropriate? (ER 244, ln.19-21)

As a result of the judge's questioning at the sentencing hearing, it was determined that the U.S. Attorney for the District of Montana was the only person with the power to reconsider the §851 Information, but he refused to

do so. (ER 242, ln. 12-18, ER 249, ln. 7-11)

The judge pointed out the injustice of the Executive Branch's sole authority for the life sentence at the hearing:

Judge: "... the United States Attorney [is] the sole authority to decide whether or not a defendant gets a life prison term." (ER 263, ln. 15-16) "...It is the discretion of the United States Attorney, not the Congress." (ER 262, ln. 20-22)

Mr. Jensen filed his Notice of Appeal on February 25th, 2004.

**2. Disposition in the Circuit Court of Appeals**

A panel of the Ninth Circuit (per Bea, C.J.) affirmed. App A.

The Court of Appeals affirmed the District court Order denying the Motion to Suppress based upon an analysis of the question in accordance with the so-called "collective knowledge doctrine." However, in justifying the arrest here, the appellate court also imputed the information held by Det. McCarvel, despite a lack of any evidence in the record that McCarvel communicated any of this information to either Cook or Meehan prior to the arrest. The Court of Appeals also ruled unfavorably to Mr. Jensen on the sentencing issue involving the separation of powers and delegation of powers doctrine. First, the panel held that the

separation of powers argument is foreclosed by the Supreme Court's decision in United States v. LaBonte 520 U.S. 751 (1997). The panel also held that the non-delegation doctrine was not violated.

## REASONS FOR GRANTING THE PETITION

### I. PROBABLE CAUSE TO ARREST, UNDER THE SO-CALLED "COLLECTIVE KNOWLEDGE DOCTRINE", CAN NOT BE JUSTIFIED, AFTER THE FACT, ON THE BASIS OF "PRESUMED KNOWLEDGE" NOT COMMUNICATED TO THE ARRESTING OFFICER.

Information from which a probable cause determination is to be made must exist from facts and circumstances known to the officers **at the moment of the arrest**. Beck v. Ohio, 379 U.S. 89, 91 (1964). (**emphasis added**). The "collective knowledge doctrine" has developed in the lower courts' decisions from several Supreme Court decisions relating to the extent to which one law enforcement officer (or a group of officers acting in concert) may rely upon information learned from each other in justifying an arrest, search, or investigatory stop, of an individual.

No case from any circuit has been found where knowledge has been imputed from another member of law enforcement that was neither at the scene, nor in close

communication with those at the scene of the arrest, stop or search. The problem inherent in expanding the pool of knowledge to those officers not directly involved at the scene, or in communication with those at the scene, has been criticized because doing so "would encourage police officers to [act] on the hope that the total knowledge of all those officers involved in a case will later be found to constitute probable cause if the search is challenged. LaFave, Israel & King, *Criminal Procedure 4th Ed., §3.3(e)*, at pg. 154.

In Whiteley v. Warden, 401 U.S. 560 (1971) members of the Laramie, Wyoming police department arrested Whiteley based upon information contained in a radio bulletin indicating that an arrest warrant had been issued for him. After finding the arrest warrant had been improperly issued, and concluding that the arresting officers had insufficient independent probable cause to arrest of Whiteley, Justice Harlan then observed:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the requisite information required to support an independent judicial assessment of probable cause. Where, however, the

> contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

Id. at 568.

Fifteen years later, this Court considered the issue of "collective knowledge" in the context of an investigatory stop in one jurisdiction, prompted by information contained in a police "wanted" bulletin generated by another jurisdiction. U.S. v. Hensley, 469 U.S. 221 (1985). In partial reliance on Whiteley, the Court noted:

> The law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal.

Id. at 232. Thus, the Court concluded:

> [I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification.

Id.

Illinois v. Andreas, 463 U.S. 765 (1983) addressed a defendant's loss of a privacy claim once contraband has

been otherwise legally discovered. It stands for the proposition that "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost." Id. at 772. However, in addressing this issue, in *dicta* contained in a footnote to the above statement, Chief Justice Burger remarked: "where law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all." Id. at 772 n. 5.

From these three cases has evolved, in the various Circuit Courts of Appeal, the so-called "collective knowledge doctrine." The "collective knowledge doctrine" has been applied in two different types of cases. The first type of situation (not at issue here) is where one officer is acting at the direct command of another officer to effect an investigatory stop, arrest or search (such as in Whiteley and Hensley). The second situation where the "collective knowledge rule" has been applied is "where law enforcement authorities are cooperating in an investigation", such as was alluded to in the Andreas footnote.

The Supreme Court has never specifically addressed what role an officer must take before they are considered to be "cooperating in an investigation." Nor has the Court

addressed what evidence of communication between cooperating officers must be established before "the knowledge of one is presumed shared by all." Consequently, the federal lower courts have been unable to settle upon a uniform rule regarding whether a stop or arrest can be justified by looking to the "collective knowledge" of the officers, in the absence of evidence of a communication between the officers.

Some lower courts have mutually imputed knowledge among officers "working together on the scene and in communication with each other", without requiring any proof of actual communication. U.S. v. Edwards, 885 F. 2d 377, 383 (Seventh Cir. 1989). However, even then information held by absent officers cannot used to establish probable cause where there is no evidence that such knowledge was communicated to the agents on the scene who actually made or ordered the defendant's arrest. Id. *at* 382, citing U.S. v. Woods, 544 F.2d 242, 260, cert. denied, 430 U.S. 969.

The Fifth Circuit Court of Appeals has applied a "laminated total" version of the rule, where the arresting officer has personal knowledge of facts which, standing alone, do not establish probable cause, but, when added to information known to other officers *with whom the arresting officer is in communication,* "tip the balance in favor of the

arrest." United States v. Kye Soo Lee, 962 F.2d 430, 436 (Fifth Cir. 1992).

The Sixth Circuit Court of Appeals has fashioned a similar rule where there is "some degree of communication" between the officers at the scene. Collins v. Nagle, 892 F.2d 489, 495 (Sixth Cir. 1989). The Eighth Circuit Court of Appeals has stated the need for "some degree of communication", while further suggesting that communication is an important basis for application of the "collective knowledge rule". U.S. v. Horne, 4 F.3d 579, 585-86 (Eighth Cir. 1993, cert denied, 510 U.S. 1138 (1994); U.S. v. Morgan, 997 F.2d 433, 435 (Eighth Cir. 1993)

The Tenth Circuit Court of Appeals has limited the "collective knowledge doctrine" as follows:

> The cases in which we have applied the "collective knowledge" rule all have involved actual communication to the arresting officer of either facts or a conclusion constituting probable cause, or an arrest order.

U.S. v. Shareef, 100 F.3d 1491, 1503 (Tenth Cir. 1996) [citations omitted]. Thus, because there was no evidence that the specific information had been shared between the officers, such un-communicated knowledge could not be imputed. Id.

In Jensen's case, the Ninth Circuit mutually imputed

information between Meehan and Cook, despite the fact that there was no evidence that any information had been shared between the officers. The wealth of the evidence suggests that Cook was acting alone, not in concert with Meehan, and without the benefit of even the opinion of either Meehan or McCarvel in arresting Jensen.

There is simply nothing in the record to suggest any communication between Meehan and Cook, beyond Cook's initial inquiry ("do you have any ongoing investigations or are you looking at [Jensen] for anything?"), and Meehan's response ( "Oh, I didn't know he was back from Mexico.") (ER 116, ln. 1-4) Indeed, the only evidence of what might have been conveyed to Cook from Meehan at the scene prior to the arrest is Cook's testimony that he "didn't know what Detective Meehan had been doing" regarding any investigation of Jensen. (ER 138, ln. 10-13). When a disappointed Cook called to obtain the unwitting permission of the Kalispell Police Department to override the decision of Flathead County officers at the scene, Meehan was trying to talk the Flathead County officers out of their no-arrest decision, and "was unaware [Cook] was making that call." (ER 152, ln. 8-13)

Moreover, there is no factual basis in the record to justify the arrest in this case on the basis of information attributed to McCarvel. McCarvel was not at the scene of

Jensen's arrest, nor is there any evidence that he communicated with either Cook or Meehan when they were in the field. McCarvel played no role in the decision to arrest Jensen. There is absolutely no evidence in the record to even suggest that any information attributed to McCarvel was "shared with Detective Meehan", or with Cook, prior to Jensen's arrest.

## II. IT IS UNCONSTITUTIONAL FOR THE SENTENCING DISCRETION TO BE SOLELY IN THE HANDS OF THE EXECUTIVE.

An independent judiciary has been a cornerstone of the judicial process for hundreds of years. The Magna Carta limited the power of the Crown in judicial proceedings. Magna Carta [¶ 39] (1215). The Declaration of Independence complained that judges had been made dependent upon the will of the King and asserted this as a reason to declare independence. Declaration of Independence [¶ 10] (1776).

Jensen's case presents this same age-old issue under circumstances never heard by this court. He was charged under §841(a)(1). If convicted he could have been sentenced under the guidelines or through §841(b)(1)(A). However, before his sentencing, a policy memo was sent out to all federal prosecutors from the Executive Branch. In response to the memo an §851 Information was filed. That memo was

the sole reason that Jensen was sentenced to life in prison.

After the district court judge tried the case and reviewed the pre-sentence report, he explicitly noted at the sentencing hearing that punishment of life imprisonment was not applicable to the facts. (ER 243, ln. 6-10; ER 262, ln. 12) The judge asked the prosecutor to state the reasons Jensen should receive a life sentence, and the prosecutor stated he could not. (ER 242, ln. 19-23) When asked if he had the power to reconsider the filing of the §851 Information, he said he did not, however he thought that the U.S. Attorney for the District of Montana did have such power. (ER 242, ln.12-18)

The judge continued the sentencing hearing two times, and asked that the U.S. Attorney either come to the sentencing hearing to state the reasons for the sentence or give the prosecutor permission to reconsider the §851. Neither happened. Jensen was sentenced to life in prison, without reason.

> The district court judge stated at the hearing: "... the United States Attorney [is] the sole authority to decide whether or not a defendant gets a life prison term." (ER 263, ln. 15-16) "He is making a choice, and he's making a policy choice that satisfies his own personal perspective and does not take into

account justice...." (ER 262, ln. 20-22)

In a memo addressed to all Federal Prosecutors, dated September 22, 2003, Attorney General Ashcroft stated how the Guidelines and §841(b)(1)(A) would be used during the time he was in office. (ER 314-321) The memo established his policy for charging criminal offenses, disposition of charges, and sentencing. Id. An §851 motion was filed in Jensen's case two days after the memo was written, which was months after Jensen was charged.

The judge in the sentencing hearing addressed his concerns about sentencing Jensen to life in prison because of the policy of the Attorney General:

> "What I can't see, ... is just because the U.S. Attorney's Office has the power to do what they're doing under the statute, is it appropriate in this case, other than a policy of Attorney General Ashcroft that says, 'We're going to charge the highest that we can and seek the highest penalty." (ER 247, ln. 1-6)

The interplay between §851 and §841(b)(1)(A) allowed the Executive Branch to exclusively control Jensen's sentence. However, the actual intent of §851 when it was enacted, was to permit greater prosecutorial and judicial flexibility in sentencing. H. Rep. 91-1444 at __ (reprinted in 1970 U.S.C.C.A.N. 4566, 4576).

The Court in Mistretta v. United States, 488 U.S. 361 (1989) noted that "...sentencing has been and should remain 'primarily a judicial function'" and that this "function has long been a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch." Id. at 390. When addressing the constitutionality of the Sentencing Commission, this Court stated, "Had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional question whether Congress unconstitutionally had united the power to prosecute and the power to sentence within one Branch." Id. at 391, n. 17. This Court noted, "[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will." Id. at 365, citing United States v Brown, 381 U.S. 437, 443 (1965).

United States v. Noland, 495 F.2d 529 (Fifth Cir. 1974) addressed the reasons for the enactment of §851, and stated that the "thrust of prior law, which required minimum sentences, was mandatory enhancement ..." Id. at 532. "The court was required to enhance the sentence of a multiple offender whether or not the prosecutor or the court thought enhancement desirable or necessary." Id. While the

purpose of "the new statutory scheme contemplates prosecutorial discretion to seek enhancement", it was not intended to grant the prosecutor the right to decree a sentence, but instead established that the judge ultimately tailored the period of imprisonment. Id. at 533 and 533, n. 3.

The court in Noland examined the reasons given by the House Committee on Interstate and Foreign Commerce for revising the penalty structure:

> "The foregoing sentencing procedures [penalties revised by the Act] **give maximum flexibility to judges**, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." **(Emphasis added)**

Id. at 533 n. 3 citing H. Rep. 91-1444 at __ (reprinted in 1970 U.S.C.C.A.N. 4566, 4576). This was the legislative intent of §851.

Even though it was created for increased flexibility in sentencing, Jensen's case shows that the intent of the legislation was not met, and the discretion of the judge and the prosecutor have been extinguished.

In addressing similar issues to Jensen's case, circuit courts have relied upon United States v. LaBonte, 520 U.S. 751 (1997). The issue presented in LaBonte was the clarification of a term in a statute concerning sentencing

enhancements. Id. at 752-753. The dicta which is frequently cited is:

> "Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhance statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors. See United States v. Armstrong, 517 U.S. 456, 464- 465, 116 S.Ct. 1480, 1486-1487, 134 L.Ed.2d 687 (1996); Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530-1531, 84 L.Ed.2d 547 (1985)."

Id. at 762.

The above dicta was not central to the decision in LaBonte. In fact, both of the cases cited as support for the above dicta, Armstrong and Wayte, concern issues of selective prosecution, not sentencing.

United States v. Crayton, 357 F.3d 560 (Sixth Cir. 2004) presented the issue of whether "§851 violated the separation of powers because the decision to request an

enhanced sentence lies with the United States Attorney, while the district court has no leeway." Id. at 571. This case relied upon the above dicta in LaBonte to decide that, "The discretion a prosecutor exercises in determining whether an enhanced statutory maximum applies under §851 is similar to the initial discretion the prosecutor has in deciding which charges to bring against a defendant, discretion that is obviously constitutional. " Id. at 572. However, an §851 Information is not a charging document. It has nothing to do with any element of an offense that must be proven by the government. It's only effect is on sentencing.

United States v. Cespedes, 151 F.3d 1329 (Eleventh Cir. 1998) also relied upon the above language in LaBonte. Id. at 1333. It presented the issue of "whether 21 U.S.C. §841 *et. Seq.* is an unconstitutional delegation of legislative authority to the Executive Branch because it place[d] in the hands of the prosecutor unbridled discretion to determine whether or not to file a sentencing enhancement pursuant to 21 U.S.C. §851 without providing any 'intelligible principle' to guide that discretion?" Id. at 1330.

In Jensen's case, the Ninth Circuit relied upon LaBonte in stating that "This argument is foreclosed by the Supreme Court's decision in United States v. LaBonte ..." United States v. Jensen, 425 F.3d 698, 706 (Ninth Cir. 2005). Courts should not decide a question of constitutional

importance based upon the dicta of a case written while deciding a completely different issue. Courts deal with cases on the basis of facts disclosed and never with nonexistent and assumed circumstance. Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937). There is no controlling precedent for the issue in Jensen's case, and the only language in modern day cases that speaks to the principles in this issue lie within Mistretta, and it all favors Jensen.

Mistretta addressed federal sentencing through principles and reasons our country was founded: There must be a balance of power. The same principles are at stake here today and that is why this Writ of Certiorari must be granted.

## CONCLUSION

The Court should grant this Petition, as the case presents two very important constitutional issues, of broad import to, and affecting numerous individuals charged with criminal offenses.

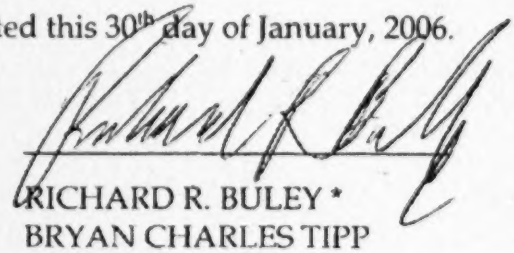
There has developed a distinct and disparate body of caselaw in the lower courts regarding the application of the "collective knowledge doctrine", and what knowledge can be imputed between law enforcement officers, to probable cause determinations, as presented herein.

Furthermore, the Executive Branch's refusal to

exercise congressionally delegated discretion in the application of 21 U.S.C. §851, resulting in a life sentence to Mr. Jensen here, presents an extremely important constitutional question of widespread potential import to others similarly situated.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 30th day of January, 2006.



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**APPENDIX A**

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (United States v. Jensen, 425 F.3d 698 (Ninth Cir. 2005)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Douglas JENSEN, Defendant-Appellant.

No. 04-30094.

Argued and Submitted Feb. 8, 2005.
Filed Oct. 6, 2005.

Imposition of sentence of life in prison without possibility of parole for defendant convicted of possession of methamphetamine with intent to distribute, who had prior drug convictions, did not violate the Eighth Amendment prohibition against cruel and unusual punishment. U.S.C.A. Const. Amend. 8; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A), 21 U.S.C.A. § 841(b)(1)(A).

Bryan Charles Tipp, Tipp & Buley, Missoula, MT, for the defendant-appellant.
Joseph E. Thaggard, Assistant United States Attorney, Great Falls, MT, for the plaintiff-appellee.
Appeal from the United States District Court for the District of Montana; Donald W. Molloy, District Judge, Presiding.
D.C. No. CR-03-27-M-DWM.

Before O'SCANNLAIN, McKEOWN, and BEA, Circuit Judges.

BEA, Circuit Judge.

It was an excess of speed that initially brought him to the attention of authorities, but bad news eventually caught up with Defendant-Appellant Douglas Jensen ("Jensen"). Jensen was convicted for possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and sentenced to life imprisonment without parole under 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1). On appeal, Jensen contends that the district court erred in denying his motion under Fed.R.Crim.P. 12(b)(3) to suppress the evidence seized from his vehicle and residence on the grounds that his arrest and the seizure of his vehicle were executed without probable cause and, accordingly, all of the evidence in the case was seized in violation of the Fourth Amendment.

Jensen also appeals his sentence on the ground that the sentencing scheme under which he was sentenced, 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1), is unconstitutional insofar as it violates: (1) the constitutional separation of powers and non-delegation doctrines; (2) Jensen's due process rights; and (3) the Eighth Amendment's prohibition

on cruel and unusual punishment.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm Jensen's conviction and sentence.

I. BACKGROUND

A. Report of Jensen's Reckless Driving

At approximately 8:00 a.m. on February 19, 2003, a private citizen saw a black 1987 Ford Taurus station wagon traveling in excess of 75 miles per hour driving northbound on Highway 93 in Flathead County, Montana. The speed limit in the area was 25 miles per hour. The citizen called 911 and reported that the vehicle was traveling at a high rate of speed and "weaving in and out of traffic" in a reckless manner. He provided the dispatcher with a description of the car and the license number of the vehicle.

Thereafter, the Flathead County Sheriff's Department issued an "attempt to locate" dispatch for a reckless, possibly drunk driver, reported by a concerned citizen, and that dispatch was received by the police department in Kalispell. An "additional attempt to locate" was later issued and broadcast, which described the car more specifically as a black 1987 Ford Taurus and provided the license plate number.

At approximately 8:30 a.m., Sergeant Lonnie Eugene Cook of the Whitefish Police Department driving south on

Highway 93, heard both the original "attempt to locate" dispatch and the additional "attempt to locate" dispatch.

B. Arresting Officer's Information Regarding Jensen's Drug Activities

Sergeant Cook had served on the Northwest Drug Task Force ("Task Force") from September 2000 to January 2003. During that time, he was also cross-deputized as a Flathead County Deputy Sheriff. In January 2003, Cook returned to service as a sergeant on the Whitefish Police Department, and was replaced on the Task Force by another Whitefish police officer, Detective Michael Meehan. While on the Task Force, Cook had received intelligence on Jensen's drug-running activities which included a description of Jensen's car: A black Ford Taurus station wagon.

On the basis of knowledge obtained during his time on the Task Force, Cook suspected that Jensen was the driver of the vehicle. Cook then called the Flathead County Sheriff's Department to confirm his suspicion that Jensen was the driver of the vehicle. After receiving confirmation from the Sheriff's Department that the car was Jensen's, Cook continued driving south on Highway 93 with the intention of intercepting the speeding vehicle. At that point, Cook heard on his police radio Flathead County Deputy

Tykachk say that the vehicle was going north at a "high rate of speed" and that Tykachk "could not get in behind it" or catch up due to the vehicle's speed. Cook continued south along Highway 93.

C. Traffic Stop

At approximately 9:00 a.m., Cook caught up with Jensen as Jensen's vehicle made a westbound turn onto Blanchard Lake Road. Sergeant Cook stopped Jensen's car, asked to see Jensen's driver's license, and proceeded to question Jensen. A short time later, Deputy Tykachk and Flathead County Corporal Phil Meredith arrived.

Corporal Meredith began to conduct an investigation and field sobriety test. Based on the information he obtained, Corporal Meredith concluded that Jensen was not intoxicated but indicated he would cite Jensen for careless driving.

D. Arrest and Impoundment of Jensen's Vehicle

From his three years of experience as a member of the Task Force, Cook knew that the Task Force had been interested in Jensen. Cook called Task Force Detective Michael Meehan and informed Meehan that Jensen was the subject of a traffic stop. Cook then asked whether the Task Force "ha[d] any ongoing investigations" or was "looking at[Jensen] for anything" to which Detective Meehan

responded, "Oh, I didn't know he was back from Mexico." Shortly thereafter, Meehan arrived at the scene of the traffic stop.

Cook called Officer Zimmerman, a senior officer on duty at the Kalispell Police Department, and inquired whether the Kalispell Police Department wished to cite Jensen for careless driving or take him into custody. Officer Zimmerman gave Cook clearance to arrest Jensen. Cook arrested Jensen and ordered Jensen's vehicle impounded. Cook then took Jensen to the impound lot, where they met Detective Meehan. After Jensen refused to consent to a search of his automobile, a police department K-9 unit drug-sniffing dog was used to check the vehicle. The dog alerted police to the presence of narcotics. Cook then transferred Jensen to the custody of the Kalispell Police Department.

As a result of the dog's indicating the presence of narcotics in Jensen's vehicle, Detective Meehan applied to a district court judge for a search warrant to search Jensen's vehicle for evidence related to the criminal possession of illegal drugs. In addition to describing the results of the canine alert, the sworn application included the statement that Jensen "is known to Meehan and other members of the [Northwest Drug Task Force] of being involved in the sale

and trafficking of methamphetamine." The application also stated:

Meehan has received recent information on or about January 21, 2003 from an informant who has been proven reliable by the NWDTF. The informant advised that Jensen was currently making a trip to the Nevada California [sic] area to pick up a large quantity of methamphetamine. The informant advised that Jensen was using his black Ford station wagon to haul methamphetamine back to Montana. The same informant advised that he knew Jensen to package methamphetamine in coffee to mask the odor. The packages were hidden inside and under the station wagon and on one occasion, the informant helped Jensen unpack a large load of methamphetamine.

In the application, Meehan also reported on information received by another member of the Task Force, Detective McCarvel. According to the application, Detective McCarvel was told in December 2002 by a citizen source "very familiar with Jensen and Jensen's drug activity" that Jensen distributed methamphetamine, and regularly traveled to California to acquire methamphetamine, on one occasion in the company of the citizen source. The citizen source told McCarvel that "Jensen had previously been arrested in another state, when he was transporting drugs

on one of these trips,""frequently concealed large quantities of methamphetamine in ··· a tool box in the bed of a pickup or a lockbox underneath the seat of the vehicle," and "commonly stored the methamphetamine in plastic containers and used cayenne pepper to help mask the odor of methamphetamine."

The search warrant application also contained information regarding McCarvel's work with another confidential informant in January of 2003. The confidential informant was reliable, according to the application, because the informant had "provided accurate, reliable information that was corroborated ··· made statements against their [sic] self interest and performed two successful controlled drug transactions." The confidential informant also claimed familiarity with Jensen's drug activities, had purchased methamphetamine from Jensen, and knew Jensen was traveling to southern California to purchase large quantities of methamphetamine for sale in Montana's Flathead Valley.

The confidential informant reportedly told McCarvel that "Jensen frequently concealed the methamphetamine in body panels or in hidden compartments, on the vehicle that he drove to California ··· frequently attempted to mask the methamphetamine with either coffee or pepper ··· [and] usually made these trips to California approximately once

every four weeks." According to McCarvel's informant, "Jensen was getting ready to leave to California (approximately the second week of January 2003), and that Jensen would be taking a 1987 Ford Taurus station wagon, black in color."

Later that same day, the county court issued a search warrant authorizing the search of the vehicle. Detective Meehan searched the vehicle and found three Tupperware containers wrapped in black tape inside the frame under the vehicle. The containers had magnets glued to the inside and contained a crystalline substance mixed with pepper. In one container was 156.5 grams of a mixture of methamphetamine and cayenne pepper. In the second container was 206.1 grams of pure methamphetamine (and an additional 106.2 grams of powder). In the third container was 419.7 grams of powder, 54.66 grams of which was pure methamphetamine.

E. Search of Jensen's Residence

Upon finding the methamphetamine in Jensen's vehicle, on February 20, 2003, Detective Meehan applied to the Flathead County district court for a search warrant for Jensen's residence. The warrant contained substantially the same information contained in Meehan's application for a

warrant to search Jensen's car, as well as a description of what that search had produced. The state court issued the search warrant, which was executed by officers the next day. In Jensen's home, officers located a briefcase, a Tupperware container, a digital scale, and bags with crystal-like substance and a small amount of marijuana. Inside a desk found in the residence, officers found a large number of sandwich bags, a scale and a marijuana pipe.

II. PROCEDURAL BACKGROUND

A. Motion to Suppress

After Jensen was indicted, he moved to suppress the evidence seized from his vehicle and residence on the grounds that his arrest for reckless driving, and the seizure of his vehicle were all conducted without probable cause and, accordingly, the evidence was seized in violation of the Fourth Amendment.

The district court denied Jensen's motion to suppress.

B. Bench Trial and Verdict

Having waived his right to a jury trial, Jensen was tried in a bench trial. That same day, the district court judge found Jensen guilty of possession of methamphetamine with intent to distribute 50 grams.

C. Sentencing Hearing and Sentence

At the sentencing hearing, the district court judge adopted the recommendation of the Presentence Report. He found that, under the Sentencing Guidelines, Jensen's base offense level was 34. See U.S.S.G. § 2D1.1(a)(3), (c)(3) (providing that possession of between 150 but less than 500 grams of methamphetamine warrants a base offense level of 34). Jensen's sentencing guideline range with a 34 base offense level would have been 210-260 months' imprisonment.

Here, however, Jensen had two prior felony convictions. Following the statute, the district court sentenced Jensen to life imprisonment and ten years supervised release under 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1).

III. PROBABLE CAUSE

[1] [2] Jensen argues that the district court erred in denying his motion to suppress evidence seized from his vehicle and residence.FN1 We review de novo a district court's denial of a motion to suppress as to issues of law. United States v. Jones, 286 F.3d 1146, 1150 (9th Cir.2002). We review the district court's findings of fact in denying a motion to suppress for clear error. Id.

FN1. We agree with the district court that the law enforcement officers had "reasonable suspicion" for the

initial traffic stop. See Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (requiring "reasonable suspicion" of criminal wrongdoing before conducting an investigatory traffic stop).

[3] [4] [5] The Fourth Amendment requires that a law enforcement officer have "probable cause" to arrest an individual without a warrant. See United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir.1989), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030, 1032 (9th Cir.2001). The test for whether probable cause exists is whether "at the moment of arrest the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." United States v. Bernard, 623 F.2d 551, 559 (1980) (internal quotation and citations omitted). A determination as to whether probable cause exists requires a "practical, common-sense" decision based on the totality of the circumstances, including the veracity, basis of knowledge and reliability of the information provided by informants. See Illinois v. Gates, 462 U.S. 213, 214, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

A. Drug Activity

[6] We conclude that Cook had probable cause to arrest Jensen on suspicion of illegal drug activity. Sergeant Cook testified that, while a member of the Task Force, he had received intelligence regarding Jensen's activities. Jensen argues that Cook's failure precisely to specify what intelligence he had received renders his testimony ineffective to support a finding of probable cause. We disagree.

1. Collective Knowledge Doctrine

Sergeant Cook's testimony that he had received intelligence regarding Jensen was sufficient for the purpose of establishing probable cause under the so-called "collective knowledge doctrine." The accepted practice of modern law enforcement is that an officer often makes arrests at the direction of another law enforcement officer even though the arresting officer himself lacks actual, personal knowledge of the facts supporting probable cause. United States v. Butler, 74 F.3d 916, 921 (9th Cir.1996); see also United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (police officers entitled to rely on radio bulletins based on reasonable suspicion of other officers). In such situations, a probable cause determination is based on the collective knowledge of the law enforcement personnel.

[7] "[W]here law enforcement authorities are cooperating in an investigation [ ], the knowledge of one is presumed shared by all." Illinois v. Andreas, 463 U.S. 765, 772 n. 5, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). "The rule exists because, in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authority to arrest a suspect is based on facts known only to his superior or associates." United States v. Valez, 796 F.2d 24, 28 (2d Cir.1986).

We elaborated on this doctrine in United States v. Bernard, 623 F.2d 551 (9th Cir.1980). There, the defendants were charged with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 812, 841(a)(1) and 846. Id. at 560. The district court granted the defendant's motion to suppress, and the government appealed. Id. at 560. We reversed, holding that the collective knowledge of all of the agents involved in the investigation and surveillance manufacturing methamphetamine was sufficient to constitute probable cause. Id. at 560 (internal citation omitted). "In effect all of them participated in the decision to make the arrests ··· [One officer] was entitled to rely on the observations and knowledge of [the others], even though some of the critical information had not been

communicated to him." Id. at 560-61.

[8] Similarly, in Hoyos, 892 F.2d at 1387, this court again held that "the arresting officer need not have personal knowledge of the facts sufficient to constitute probable cause" and "need not be aware of all the facts and circumstances known to the other officers participating in the arrest." Id. at 1392. Rather "probable cause may be based on the collective knowledge of all the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom." Id.

Under Bernard and Hoyos, then, "when there has been communication among agents, probable cause can rest upon the investigating agents' 'collective knowledge.' " United States v. Del Vizo, 918 F.2d 821, 826 (9th Cir.1990) (citing Bernard ); see also United States v. Sandoval-Venegas, 292 F.3d 1101, 1105-1106 (9th Cir.2002).

2. Information Known By Individual Agents Here

Here, considering all of the circumstances, we conclude that the record clearly establishes that Sergeant Cook and members of the Task Force had extensive and specific knowledge of Jensen's drug-related activities.

a. Information Known By Detective Meehan

Detective Meehan became involved in the stop of Jensen when Sergeant Cook called him and asked whether

the Task Force was "looking at [Jensen] for anything." Meehan then drove to the scene of the stop to consult with Cook and was present at the time of Jensen's arrest. The record indicates that, prior to the time of the arrest, Meehan had been told by an informant on or around January 21, 2003 that "Jensen was currently making a trip to the Nevada California area to pick up a large quantity of methamphetamine."

In addition, Meehan learned from the informant that Jensen was using his black Ford station wagon, the car he was driving when he was stopped by Officer Cook. Meehan's informant told of assisting Jensen in procuring a large quantity of methamphetamine, related in detail Jensen's method for packaging the drug to avoid detection, and described where Jensen secreted containers of methamphetamine in the station wagon.

b. Information Known By Detective McCarvel

At the time of Jensen's arrest, another member of the Task Force, Detective McCarvel, possessed extensive information regarding Jensen's activities, information he had shared with Detective Meehan. The record reflects that McCarvel had learned from a citizen source that Jensen regularly went to California to purchase methamphetamine, "frequently conceal[ing] large quantities of

methamphetamine in his vehicle."

c. Information Known By Sergeant Cook

During the suppression hearing, Cook testified that while working on the Task Force, he had received intelligence on Jensen. In particular, Cook testified that: "I had prior intelligence from the Northwest-working on the Northwest Drug Task Force that Mr. Jensen may be involved in some other things." Cook and Meehan-his replacement on the Task Force-worked in close contact during the arrest. Cook called Meehan after Jensen had been stopped. After stating, "I didn't know he was back from Mexico," Meehan immediately proceeded to the scene of the traffic stop.

It is clear that the facts and circumstances within the knowledge of Sergeant Cook and Detective Meehan, and of which they had reasonably trustworthy information, were sufficient to support a belief that Jensen had committed a narcotics offense. The record indicates that the totality of the circumstances at the time Cook arrested Jensen included intelligence gathered by Cook during his service on the Task Force, as well as the information contained in the sworn warrant application submitted by Meehan. Accordingly, Jensen's arrest was supported by probable cause. See Butler, 74 F.3d at 921.

B. Impoundment of Jensen's Vehicle

[9] [10] Based on the evidence supporting Jensen's arrest, as well as the results of the canine sniff test,FN2 impoundment of Jensen's vehicle was proper under the Fourth Amendment, because Cook had probable cause to believe the vehicle contained illegal drugs. See United States v. Ibarra, 345 F.3d 711, 715 (9th Cir.2003).

FN2. We also note that such use of a narcotics-detection dog does not itself constitute a search so as to implicate Fourth Amendment concerns. See Illinois v. Caballes, 543 U.S. 405, ----, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005).

Cook also had the authority to impound Jensen's vehicle under the "community caretaker doctrine." Once the arrest was made, the doctrine allowed law enforcement officers to seize and remove any vehicle which may impede traffic, threaten public safety, or be subject to vandalism. See Hallstrom v. City of Garden City, 991 F.2d 1473, 1477 n. 4 (9th Cir.1992); see also Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

The district court specifically found that Jensen's vehicle was parked in the road "such that it was reasonable for Sgt. Cook to impound it to remove the obstruction to traffic."

Moreover, the district court found that "Sgt. Cook's concerns about vandalism were reasonable." The district court did not clearly err in making these findings.

Accordingly, we affirm the district court's decision to deny Jensen's motion to suppress.

IV. SENTENCING

[11] Jensen also argues that the sentencing penalty provided under 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1) is unconstitutional in that it: (1) violates the separation of powers and non-delegation doctrines; (2) violates Jensen's due process rights; and (3) subjects Jensen to cruel and unusual punishment in violation of the Eighth Amendment. We review the constitutionality of a statute de novo. See United States v. Stokes, 292 F.3d 964, 966 (9th Cir.2002), and we affirm.

The statutory scheme at issue here, Section 841(b)(1)(A), provides for the possibility of life imprisonment for any person who violates the statute where such person has two prior convictions for a felony drug offense. See21 U.S.C. § 841(b)(1)(A)(viii). Under Section 851, increases in sentence based upon prior felony drug convictions may not be imposed unless the United States Attorney first files a written information stating the prior convictions to be relied upon. See21 U.S.C. § 851(a)(1). A

defendant may challenge the use of any of the prior convictions that occurred within the last five years. See21 U.S.C. § 851(b)-(c) & (e). Once the Government files the information, the sentencing court is then required to impose the enhanced sentence "if the court determines, after hearing, that the person is subject to increased punishment by reason of two prior convictions." 21 U.S.C. § 851(d)(1).

A. Separation of Powers

First, Jensen contends that the sentencing scheme violates the separation of powers doctrine under Article I of the Constitution insofar as the Sentencing Guidelines "no longer apply" once a Section 851(a)(1) information is filed, and thus any discretion with respect to sentence is vested in the executive-rather than judicial-branch. According to Jensen, this impermissibly infringes on the ability of the district court to impose a sentence of less than life imprisonment.

[12] This argument is foreclosed by the Supreme Court's decision in United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997). There, the Court rejected an argument that prosecutorial discretion under Section 851 resulted in unconstitutional disparity in sentencing, observing that the discretion available to prosecutors under Section 851 is "similar to the discretion a

prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect," and holding that such discretion is constitutional. Id. at 762, 117 S.Ct. 1673.

Jensen also argues that Section 851 violates the non-delegation doctrine inasmuch as it delegates to the executive branch the legislative power and discretion to sentence defendants under the sentencing provisions of Section 841. Jensen's argument is unavailing. Under the Supreme Court's decision in United States v. Mistretta, 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), delegation is permissible so long as there are "intelligible principles" by which to exercise the delegated authority. While this court has not directly addressed the question whether the sentencing scheme at issue here violates the non-delegation doctrine, two circuits have concluded that the sentencing scheme does not impermissibly delegate legislative authority to the executive. See, e.g., United States v. Crayton, 357 F.3d 560, 571-72 (6th Cir.2004) (holding that 21 U.S.C. § 851 does not violate the non-delegation doctrine); United States v. Cespedes, 151 F.3d 1329, 1333 n. 1 (11th Cir.1998) (holding that Section 851 does not constitute a delegation of legislative power and concluding that "even if the sentence enhancement provisions of § 851 were characterized as a delegation of legislative power, we would

find that Congress had provided altogether intelligible principles to render the delegation constitutional"). We find this reasoning persuasive and similarly reject Jensen's separation of powers claim.

B. Due Process

[13] Jensen argues that the sentencing scheme violates his due process rights under the Fourteenth Amendment insofar as it vests all discretion in the Attorney General and the United States Attorney and confers no discretion on the sentencing judge. This argument is foreclosed by our decision in United States v. Van Winrow, 951 F.2d 1069 (9th Cir.1991), where we rejected the argument that the imposition of a life sentence for three prior drug convictions under 21 U.S.C. § 841(b)(1)(A) violates due process by depriving the trial judge of discretion to impose sentence. We held that such sentences are "individualized according to quantity and variety of narcotic possession" and "according to the number of prior felony drug convictions," and thereby comport with due process. Id. at 1071.

C. Eighth Amendment

[14] Finally, Jensen argues that the sentencing scheme imposed a sentence that was not "proportional" to the crime, thereby subjecting him to cruel and unusual

punishment in violation of the Eighth Amendment. This argument is foreclosed by the Supreme Court's decision in Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (affirming Michigan court's imposition of a life sentence for a first time conviction for drug possession holding that such sentence does not violate the Eighth Amendment); see also United States v. Van Winrow, 951 F.2d 1069, 1071 (9th Cir.1991) (rejecting defendant's argument that the imposition of a life sentence for three prior drug convictions under 21 U.S.C. § 841(b)(1)(A) was cruel and unusual in violation of the Eighth Amendment).

V. CONCLUSION

We conclude that Sergeant Cook had probable cause to arrest Jensen for suspicion of drug trafficking under the collective knowledge doctrine. We therefore affirm the district court's denial of Jensen's motion to suppress the evidence seized from his vehicle and residence.

Moreover, we reject Jensen's arguments regarding the constitutionality of the statutory scheme under which he was sentenced, 21 U.S.C. § 841 and 21 U.S.C. § 851. Accordingly, we affirm the district court's sentence of life imprisonment without parole.

AFFIRMED.

## APPENDIX B

Constitution of the United States
Amendment IV

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## APPENDIX C

21 U.S.C. §841(a)(1),
21 U.S.C. §841(b)(1)(A),
and
21 U.S.C. §851

21 U.S.C. §841(a)(1)

> a) Unlawful acts
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

21 U.S.C. §841(b)(1)(A) states in the pertinent part:

> If any person commits a violation of this subparagraph ... after two or more prior convictions for a felony drug offense have become final such person shall be sentenced to a mandatory term of life imprisonment without release.

21 U.S.C. §851

> (a) Information filed by United States Attorney.
> (1) No person who stands convicted of any offense under this part [21 U.S.C. §§841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, ...the United States attorney files an information with the court...